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IN THE

Supreme Court of the United States

October Term, 1952.

No. 433.

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

v.

JOSEPH J. PURVIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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JOSEPH J. PURVIS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Pennsylvania Railroad Company, petitioner, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case on August 4, 1952.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania (R. 69a-73a) is reported in 98 F. Supp. 212. The first opinion of the Court of Appeals (R. 6-7) is not reported. Its second opinion is reported in 198 F. 2d 631.

The opinion of the District Court for the Eastern District of Pennsylvania after the first trial of this case is only indirectly involved in this proceeding, and is not printed in the record. It is reported in 96 F. Supp. 698.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1952 (R. 20-21). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Does federal law require "clear and convincing" evidence or merely a "preponderance" of evidence to avoid on the ground of fraud a contract or release given by an employee to his railroad employer?

2. Under either standard of proof, is there an issue of fact for the jury when the only basis for avoiding two releases given by an employee is the employee's testimony that the first release "must have been" covered by another paper when signed and that he did not read the second release when signing it?

STATEMENT OF THE CASE.

Plaintiff brought this action under the Federal Employers' Liability Act to recover for injuries resulting from an accident which had occurred in 1943, almost three years before the action was instituted. Twelve days after the accident, subsequent to his return to work, and without any railroad representative asking him to do so, he went to the defendant's claim department (R. 12a, 34a). There he signed a full release of his claim for personal injuries. This release was upon a form captioned in large type "THIS IS A RELEASE" which recited the plaintiff's name, position and the date and place of the accident. In large type just above plaintiff's signature the document recited that the plaintiff had read it and understood it (R. 66a-67a). He was then given a check which he endorsed and cashed later in the day out of the presence of any representative of defendant's claim department, signing his name immediately beneath the following language (R. 30a, 68a):

"In full settlement and satisfaction of all claims, demands and causes of action resulting from personal injuries sustained while employed as Freight Brakeman, at or near Philadelphia, Pennsylvania, on or about October 13, 1943."

At the first trial in 1947, plaintiff contended that he and the claim agent with whom he had talked were mutually mistaken concerning the extent of his injuries. After a jury disagreement defendant's motion for judgment was overruled on the ground that there was some evidence of such a mistake (see 96 F. Supp. 698, 700).

At the second trial in 1950 plaintiff's own testimony established that there was no mutual mistake as to injuries (R. 55a, 56a), and plaintiff's contention shifted to a claim of fraud. He testified that he had talked to the claim agent about his lost wages (R. 13a), and asserted for the first time that there "must have been" a paper over the standard release form when he signed it (R. 24a-29a). The only thing he said about the release agreement on the back of the check was that he didn't read it before endorsing the check by writing his signature directly under the release (R. 30a).

The jury found that plaintiff did not "know that he was signing a release of his claim for injuries" and rendered a verdict in favor of plaintiff for one thousand dollars. Thereafter, the District Court (Bard, J.) granted defendant's motion for judgment. It ruled that plaintiff's testimony concerning execution of the standard form release was given too hesitantly and had too many inconsistencies to constitute the "clear and unequivocal" evidence of fraud required by the law (R. 72a, 98 F. Supp. 214). Judge Bard held, further, that the release on the check was a bar as a matter of law, there being no evidence whatever that there was any misrepresentation or mistake which was a factor in plaintiff's signing it (R. 72a-73a, 98 F. Supp. 214).

Plaintiff appealed to the Court of Appeals for the Third Circuit, which, after argument, handed down the following *per curiam* opinion (R. 6-7):

"Our own examination of the record satisfies us that the District Judge did not commit any substantial errors of law and that, under the facts, the judgment below is clearly right. It will be affirmed."

Shortly thereafter this Court decided the case of *Dice v. Akron, C. & Y. R. R.*, 342 U. S. 359 (1952), and the Court of Appeals ordered a rehearing in the case at bar. After the rehearing the Court of Appeals [1] reversed itself and the District Court and directed reinstatement of judgment upon the jury verdict for plaintiff. The Court of Appeals disagreed with Judge Bard as to the legal sufficiency of the release upon the check, but its opinion did not discuss the lower court's conclusion that the evidence as to fraud was insufficient to submit to the jury as "clear and unequivocal." However, the Court of Appeals expressly rejected the requirement that proof of fraud in this type of action be clear, unequivocal and convincing, which it recognized as the prevailing federal rule, and held that under federal law fraud may be proved merely "by a preponderance of relevant evidence". Further, it directed the District Court judges of the Third Circuit to apply that test in the future (R. 19).

The petitioner seeks review of the judgment entered in accordance with that opinion (R. 20-21).

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below not only reversed its own earlier decision in this case, but it is in direct conflict with its earlier opinion in *Callen v. P. R. R.*, 162 F. 2d 832 (3rd Cir. 1947),[2] and with the leading case in the Eighth Circuit, *Chicago & N. W. Ry. v. Wilcox*, 116 Fed. 913

1. The same judges who had heard the original argument on appeal, i.e., Circuit Judges McLaughlin, Kalodner and Staley. Judge Kalodner "concurred in the result" (R. 19).

2. Aff'd 332 U. S. 625 (1948).

(1902), which sets forth what has heretofore been uniformly applied as the federal rule concerning the quantum of proof necessary to avoid a release or other contract: *Whitmarsh v. P. R. R.*, 61 F. Supp. 850, 852 (E. D. Pa. 1945); *Lion Oil Refining Co. v. Albritton*, 21 F. 2d 280, 282 (8th Cir. 1927); *Merwin v. N. Y., N. H. & H. R. R.*, 62 F. 2d 803, 804 (2d Cir. 1933); see RESTATEMENT, CONTRACTS § 511; 5 WILLISTON ON CONTRACTS §§ 1597-1598 (Rev. ed. 1937).

The new rule announced by the court below resulted from its prediction, based upon one sentence lifted from the dissenting opinion in *Dice v. Akron, C. & Y. R. R., supra*, as to what this Court would hold should the question be presented to it. The Court of Appeals for the Third Circuit said (R. 19, 198 F. 2d 633-4):

> "We are satisfied that *if and when* the problem is squarely before the Supreme Court the rule pronounced will be in accord with Mr. Justice Frankfurter's above quoted language ['proof of fraud need be only by a preponderance of relevant evidence'—dissenting opinion] and therefore, in fairness to the district judges of this circuit and to ourselves, we adopt that test for this circuit in applicable instances." (Emphasis added.)

Thus the Court of Appeals created a conflict in federal law where no conflict theretofore existed, and the matter should be resolved by this Court in order to eliminate the inevitable confusion, expense and litigation which such a conflict breeds. As this Court has emphasized, uniformity of law as to the validity of releases under the Federal Employers' Liability Act is essential to effectuate the purposes of that Act: *Dice v. Akron, C. & Y. R. R.*, 342 U. S. 359, 361 (1952).

2. The decision of the court below will have a seriously adverse effect upon future settlement negotiations. Settlements are favored by the law. A rule which will facilitate upsetting them in the absence of clear and con-

vincing reasons is contrary to the strong policy which requires respect for written contracts as final and binding. That policy has been expressed in virtually every jurisdiction by the requirement that a contract may be avoided only if fraud is proved by evidence variously described as "clear", "clear and convincing" or "clear, convincing and unequivocal." That measure of proof has been adopted by the American Law Institute: RESTATEMENT, CONTRACTS § 511.

Certainty is an important element in contract negotiations and a uniform rule for state and federal courts is needed. A proposed new federal rule in conflict with earlier decisions, both state and federal, merits full consideration by this Court and should not be rested on a single sentence from a dissenting opinion.

3. The question of the quantum of proof involves more than mere phraseology, as is well demonstrated by the case at bar. When the trial judge and the judges of the Court of Appeals were applying the rule requiring "clear and convincing" proof, plaintiff was unable to prevail. His only explanation of his signature on the release was that a piece of paper must have covered it, a thought expressed for the first time at the second trial seven years after the release was executed. The plaintiff, by his own admission an experienced business man (R. 26a),[3] would not say categorically that the paper *was* over the release, but under constant questioning used such phrases as "that must have been covered up with paper" (R. 24a), "I imagine it was" (25a), "I am most sure it was" (26a). In short, plaintiff's own testimony concerning the basic fact upon which he relied was equivocal, and Judge Bard quite correctly held that plaintiff had not proved his case by "the clear and unequivocal evidence required by the law" (R. 72a). Judge

3. He had worked for many years in his own business and as a club manager, as appears from his testimony at the first trial—N. T. 20-22, 29, 53.

Bard's decision in this respect was so clearly correct that the Court of Appeals affirmed it in a two sentence *per curiam* opinion (R. 6-7).

When the Court of Appeals reconsidered its opinion after the dissent in the *Dice* case, however, plaintiff's equivocal explanation was held to create a jury issue. The reversal of position can be explained only on the basis of the test applied by the court in deciding what kind of evidence was sufficient to make out a *prima facie* case. This case, therefore, demonstrates the substantial effect that a rule concerning the quantum of proof in fact plays in the ultimate outcome of litigation.

4. The ruling of the Court of Appeals that the kind of evidence presented in this case constitutes sufficient *prima facie* proof of fraud to vitiate an employee's release is in conflict with this Court's decision in *Callen v. P. R. R.*, 332 U. S. 625 (1948). In that case the Court expressly rejected an argument that the burden of proof should be upon a railroad employer to establish the absence of fraud in an employee's release, holding that in the absence of legislation to the contrary, settlements of litigation have *prima facie* validity, and the employee attacking a settlement must bear the burden of showing it is "tainted with invalidity, either by fraud practised upon him or by a mutual mistake . . ." 332 U. S. at 630. As a practical matter, no difference exists between a ruling that places the burden of proof upon the employer and a ruling that a *prima facie* case of fraud is made out by the kind of argumentative and inconsistent testimony plaintiff offered here that when he signed one release it "must have been" obscured and that he did not read the second release when signing it.

5. The Court of Appeals for the Third Circuit prefaced its announcement of the new rule with the statement (R. 18):

> "Though of but collateral interest in this particular case, it is important to comment at this time on the quality of proof necessary to set aside a release in this type of action."

This "comment" does not diminish in any way the importance of the Court's ruling as a breeder of conflict in an area of federal law where uniformity is particularly desirable. The new rule is controlling on District Courts of the Third Circuit, whose decisions will thus conflict with those in the other circuits. Moreover, the record makes it plain that the Court of Appeals misconceived the pertinence of its ruling to this lawsuit, else it would not have referred to it as of "but collateral interest in this particular case." In the first place, when clear and convincing proof of fraud was the test, the judgment of the District Court was affirmed *per curiam* as "clearly right", whereas under the preponderance of evidence test the judgment was reversed. In the second place, the District Court's unchallenged conclusions precluded reversal on any theory if the clear and convincing test were applied. Having heard the plaintiff testify as to the signing of the printed release, the Court found the testimony was given too hesitantly and had too many inconsistencies to be clear and unequivocal evidence. Any verdict in favor of plaintiff "would at best, it seems to me, be based only upon a preponderance of evidence . . ." (R. 72a). The Court of Appeals, in reversing, did not in any way question the correctness of these conclusions.[4] Consequently, its holding that a preponder-

4. The District Court later in its opinion stated: "While *it may be that there was sufficient evidence of fraud surrounding the signing of the printed release in order to take that issue to the jury,* no fraud was perpetrated when plaintiff indorsed the check, and there was nothing for the jury to consider in this regard" (R. 72a). The Court of Appeals quoted only the words underlined, and then stated: "*We agree with the district judge* that the validity of the release, under the testimony, was properly a jury question

ance of the evidence establishes fraud was essential to the reversal rather than "of but collateral interest."

6. The ruling of the Court of Appeals that the release on the check should be disregarded ignores this Court's decision in *Callen v. P. R. R.*, 332 U. S. 625, 630 (1948), and well-settled federal law, quite apart from the question as to the quantum of proof. The release on the check in the case at bar was legibly printed and typewritten in perfectly understandable language (R. 68a). The plaintiff made no pretense that he was induced to sign it by misrepresentation or because of mistake. He admitted that he signed it of his own volition when unaccompanied by any representative of defendant (R. 30a). He simply said that he didn't read it (R. 30a). Careful research fails to reveal any authority, state or federal, which has permitted avoidance of a release or other contract upon that ground. Rather, the universal rule is that one who is given the opportunity but fails to read a contract before he signs it is bound thereby. See the many cases collected in 1 WILLISTON ON CONTRACTS §§ 90-90C, 95A (Rev. ed. 1936). See also Judge Learned Hand's succinct analysis of the rule in *Ricketts v. P. R. R.*, 153 F. 2d 757, 760 (2d Cir. 1946); and the application of the rule to an F. E. L. A. action in *Merwin v. N. Y., N. H. & H. R. R.*, 62 F. 2d 803, 804 (2d Cir. 1933).

The Court of Appeals in the instant case decided that the release on the check could be disregarded, not because plaintiff had neglected to read it, but for the sole reason that plaintiff claimed a paper must have obscured a separate and entirely different document, the standard release form which he had executed earlier in the day. The Court reasoned that to hold otherwise would destroy plain-

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. . ." (R. 17) (emphasis supplied). The full text of the District Court's opinion, however, makes it perfectly plain that the judge held that the validity of the release was *not* a jury question under the testimony if the clear and convincing test were applied (R. 69a-73a).

tiff's right to have the jury pass upon the validity of the first release (R. 18, 198 F. 2d 633). That, we submit, begs the question. The very purpose of the release on the check is to create an assurance that unjustified claims concerning the nature of the settlement negotiations will not be made after the negotiations have terminated. That assurance is created by giving the employee involved a second release which he may examine and sign at his leisure. Through the release on the check which must of necessity come to his personal attention he is given a full and fair disclosure and the opportunity to indicate his complete satisfaction with the bargain he has made. The plaintiff in the instant case did exactly that. He signed two contracts, and he suggested no ground which would serve to set aside the second. He in effect said, "I understand fully why I am getting this money from the railroad, and I agree to accept it subject to that understanding." Whether his agreement is thought of as a contract independent of the earlier release or is thought of as a ratification of an earlier settlement negotiation makes no difference. The bargain was clear. Such a release would bind anyone else. In accordance with this Court's ruling in the *Callen* case, it should bind this railroad employee.

To disregard the strong policy which has led the courts to protect settlements and to permit the opening of claims upon such frivolous grounds as were presented in this case jeopardizes the practice of settling claims. Day in and day out all types of controversies and disputed claims are settled and the settlements are evidenced by releases. Federal and State courts have, heretofore, universally recognized that such releases and contracts of settlement must not be lightly disregarded. At the same time the law has developed adequate safeguards against true cases of fraud, overreaching, or mistake. The decision of the court below goes far beyond these established safeguards. It will only serve to invite attack on completed settlements and to cast grave doubt on the effectiveness of the amicable adjust-

ment of disputed claims and controversies—a practice which until now has been almost universally accepted as sound and desirable. The case is a small one. The principles involved are important and require review by this Court.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

H. FRANCIS DELONE,
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OPINIONS BELOW.

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The opinion of the District Court for the Eastern District of Pennsylvania after the first trial of this case is not printed in the record. It is reported in 96 F. Supp. 698. It is significant, because it concedes that there was a 'preponderance' of evidence that the release was obtained by fraud or mistake.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 4, 1952 (R. 20a-21a). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED.

1. Did not the Court below properly hold that a mere "preponderance" of evidence, as distinguished from evidence which was "clear, convincing and indubitable" was sufficient to sustain a jury finding that the release was obtained by fraud, accident or mistake?

STATEMENT OF THE CASE.

Suffice it to say that the plaintiff brought this action under the Federal Employers' Liability Act for injuries sustained while at work. According to the facts, all that the plaintiff was seeking and all that the Claim Agent intended to pay him at the time the release was obtained were his lost wages for the period during which he was away from work following the accident. There was no discussion of a settlement of the claim for damages, nor did the plaintiff intend at that time to settle that claim, as he was yet unable to determine the exact nature and extent of his injuries or the prognosis thereof. The Claim Agent had the plaintiff execute such a release in the mistaken belief that it was a receipt for wages. The plaintiff then endorsed the check given in payment thereof, and did not read the "fine print" thereon that repeated the language of the release mistakenly or fraudulently obtained from the plaintiff and which he believed was a receipt for wages.

The jury answered "NO" to this inquiry: "Did the plaintiff know that he was signing a release in his claim for injuries?"

A verdict of One thousand ($1000.00) Dollars was rendered for the plaintiff.

Judgment n. o. v. was entered on the ground that though there was a preponderance of evidence adequate to support the jury finding of mistake or fraud in the release, it was not evidence which was clear, convincing and indubitable within the language of the case of *Callen v. P. R. R.*, 162 F. 2d 832.

Argument

The Court of Appeals affirmed without the opinion being reported.

This Court then decided the case of *Dice v. Akron C. & Y. R. R.*, 72 S. Ct. 312, 342 U. S. 359. The Court of Appeals then granted a petition for rehearing and reversed its former action, its opinion being found in 198 F. 2d 631. The Court of Appeals reversed and held that since admittedly there was a preponderance of evidence in support of the jury verdict and a finding that there was a mistake or fraud in obtaining the release, the jury verdict in favor of the employee should be affirmed. The Court also added that it was specifically retreating from its former view, expressed in the case of *Callen v. P. R. R.*, supra, in the Court of Appeals, that a release cannot be set aside except by evidence which was clear, convincing and indubitable. It held that this Court has made it clear that there is no justification for imposing upon an employee the burden of proving accident, mistake or fraud in a release by such an onerous and rigorous quantum as "clear, convincing and indubitable" and that a mere "preponderance" would suffice.

The railroad filed this petition for certiorari.

ARGUMENT.

1. *Mere "Preponderance" of Proof of Fraud, Accident or Mistake in a Release is Sufficient to Sustain Setting Aside Such Release.*

A short reference to the evidence is in point at this place. At page 51a, Claim Agent Colehower, on interrogation by counsel for the plaintiff was asked:

"Q. Now, then, it was your intention when you prepared the check for $45, it was your intention to pay Purvis for the loss of wages only, wasn't it?

"MR. DeLONE: Objected to.

"THE WITNESS: It was not.

"BY MR. WHITE:

"Q. Now, let me refresh your recollection.

"THE COURT: Have you finished?

"THE WITNESS: No, I wasn't.

"MR WHITE: Oh, sorry.

"THE COURT: Go ahead, you may finish.

"THE WITNESS: It was not. It was my intention to settle his claim for personal injuries, using the loss of wages as a basis therefor.

"BY MR. WHITE:

"Q. I see. Well, now, do you recall being a witness for the railroad at the trial in November 11, 1947, or November 12th?

"A. Yes, I do.

"Q. Well, now, I refer you to transcript of testimony, page 162, and ask you whether you recall this question?

'Now, then, Mr. Colehower, it was your intention to pay him for his lost wages only, wasn't it?

A. Yes, I would say that.'

"Now, do you remember that testimony?

"A. Yes.

"Q. And is that the case?

"A. That is correct. It was my intention to pay him only an amount covering his loss of wages.

"Q. I see, and it was lost wages that was being discussed primarily at that time?

"A. I wasn't quite through with what information I had then.

"Q. How did you compute the matter of $45, Mr. Colehower?

"A. His daily rate, as I remember it, was $7.82. By multiplying that by six days, I get the figure of $46.92, I believe it is. I asked him if he was willing to accept $45, and he said that he was.

"Q. And that was considered by both of you as the amount of his lost wages for the six-day period?

"A. It was considered by me as a settlement of his claim.

"Q. Well, now, were you aware at that time that Mr. Purvis was still under medical attention?

"A. No, sir."

Without being repetitious, there can be no doubt that the jury could find from the plaintiff's testimony that, without contradiction, he believed he was executing a receipt for wages only. Indeed, at page 50, Mr. Colehower testified in corroboration that "he (plaintiff) asked for payment covering his time lost." Likewise, Colehower, on cross-examination, admitted that at a prior trial he had testified not that he thought he was settling the claim but, to the contrary, that he was only paying Purvis his wages. Thus:

"Now, then, Mr. Colehower, it was your intention to pay him for his lost wages, only, wasn't it?

"A. Yes I would say that."

It is true that many lines later he reiterated his present contention that he considered what he was doing as a settlement of the whole claim rather than a payment of wages. But it was for the jury to say which of his two statements it was going to believe and, by its verdict, the jury had a right

to believe, and did believe, that Colehower as well as Purvis intended only to pay Purvis his lost wages as such.

If this is true, then clearly no release was ever intended by either of the parties with respect to the injuries. If this is true, neither of the parties agreed upon execution of a release and Colehower was guilty of fraud when he had the plaintiff execute a release and endeavored to get him to do so by hiding the words "This Is A Release." This, likewise, was for the jury to decide and the jury did so decide by finding for the plaintiff.

However, giving Colehower the benefit of the doubt as to his honorable intentions and assuming that he intended this to be a settlement of the whole claim, there would still be a mutual mistake of fact—Colehower, intending to settle the whole claim,—the plaintiff intending to receive payment for his lost wages without consideration of his claim for his injuries.

Nor can the signature of the plaintiff on the check, under the fine print on the back of the check, be of any help to the defendant. Admittedly, there was evidence from which the jury could find that the plaintiff had not read that material on the check.

The legal effect of his failure to read it, under the Dice case, is merely that he was guilty of negligence.

The Supreme Court of the United States now has said in the *Dice* case:

> "Second. In effect the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act to give railroad employees a right to

recover just compensation for injuries negligently inflicted by their employers. * * * We hold that the correct federal rule is that * * * a release of rights under the Act is void when the employee is induced to sign it by the deliberately false and material statements of the railroad's authorized representatives made to deceive the employee as to the contents of the release * * *."

Therefore, once there is adequate evidence that the jury could find that there was any fraud in the execution of the release itself, the negligence of Purvis in failing to read the printed material on the check in completion of the release is of no importance, as the release must be held to be void.

The check is but mere payment pursuant to the terms of the release. Payment is but one of the conditions of the release. If the primary thing—the release—fails, the check cannot have any significance. The employee did not agree to give two releases for his wages. As Judge McLaughlin, in the Court of Appeals, said:

"Whatever might be said about him agreeing to sign the release there is not the slightest evidence that he agreed to sign two releases for forty-five dollars. According to the railroad he was given what was represented as the equivalent of money in consideration of his release. In order to actually obtain his property, the forty-five dollars, he was forced to formally endorse the check but not as a reaffirmance of the release which the jury found he never signed with knowledge. We reject as unreasonable the theory of the endorsement indicating ratification of the release as a matter of law where as here Purvis at the time did not even know he

had executed a release. Rockwell v. Capital Traction Co., 25 App. D. C. 98. See also Miles v. Lavender, 9 Cir., 10 F. 2d 450; Penn Mutual Life Ins. Co. v. Ashton, 10 Cir., 93 F. 2d 565, 567, 568; Whitmarsh v. Pennsylvania R. Co., D. C. E. D. Pa., 61 F. Supp. 850; Brown v. Pennsylvania R. Co., 2 Cir., 158 F. 2d 795. * * *"

The jury finding that the employee did not know or believe he was executing a release of his claims is dispositive of the issue.

When we were before this Court in the case of *Callen v. P. R. R.*, supra, previously, we strongly urged, without success, that this Court should adopt a rule for railroad employees similar to that announced in favor of seamen in *Garrett v. Moore-McCormick Co.*, 317 U. S. 239, that would impose the burden of establishing the validity of a release on the employer. By a Court divided five to four, we failed in our purpose. However, left undecided by this Court in the *Callen* case, but now clearly decided in the *Dice* case, is the question of what quantum of proof a railroad employee needs to set aside a release. In virtual unanimity of opinion, this Court, in the *Dice* case, held that "*such proof of fraud need be only by a preponderance of relevant evidence*" (emphasis ours). This language is to be found in the dissenting opinion of Mr. Justice Frankfurter. It is a fortiori, the view of the majority who refused to send the case back at all for retrial on the issues and ordered judgment for the employee reinstated then and there.

This is obviously the unanimous view of this entire Court. It is one of the phases of the Federal Employers' Liability Act in which there is no dispute among the members of this Court. And rightly so.

The vicious doctrine of the case of *Chicago & N. W. R. R.*

Co. v. Wilcox, 116 F. 913, 914 (C. C. A. 8, 1902), is the view to which the petitioner seeks to have this Court now revert and adopt in this phase of labor relations. Even that Court was divided and Judge Thayer wrote a vigorous dissent which, today, is everywhere followed.

Nor until the Court of Appeals for the Third Circuit, in unnecessary dicta, repeated that language in the *Callen* case, did the *Wilcox* view find itself restated in Federal Employers' Liability Act cases in the Courts of the United States.

What is the Federal common law on releases? This Court in the *Garrett* case, supra, reviewed some of the cases under the Federal Employers' Liability Act (non-maritime tort actions). The cases cited in footnote 17 of that case all sustained judgments for the injured employee and held the releases properly set aside. None set up the severe and strained standard of proof suggested by *Chicago & N. W. R. Co. v. Wilcox*, supra, upon which the Court below here relied. There was some conflict between the various Federal courts as to the burden of proof on releases in ordinary tort actions, but none in Federal Employers' Liability Act cases until the *Callen* case. The Court of Appeals (C. A. 3) in *Callen*, supra, relied on the *Wilcox* case, supra, where by a *divided* court, it was held that, "* * * A written agreement of settlement and release may not be rescinded for fraud or mistake, unless the evidence of the fraud or mistake is *clear, unequivocal and convincing*" (emphasis supplied).

Wilcox was a simple tort case, not involving a master-servant relationship and was not an action under a Federal statute, written as was the Federal Employers' Liability Act to give the widest possible protection to injured railroad employees. *Lilly v. Grand Trunk Western R. Co.*, 317 U. S. 481, 485, 63 S. Ct. 347 (1943); *Great Northern R. Co. v. Donaldson*, 246 U. S. 121, 38 S. Ct. 230 (1917).

Argument

The *Wilcox* case is more revered for its antiquity than its authoritativeness or scholarliness. In employee suits against railroads prior to the Federal Employers' Liability Act and since the passage of that Act, most courts have not followed the decision of the *Wilcox* case. Some have expressly preferred the dissenting opinion of Judge Thayer in that case. Even the few in non-master-servant tort cases which seemingly cited the *Wilcox* case with approval, managed to set aside the releases by distinguishing it or by holding the evidence adequate to meet the *Wilcox* test. *Lion Oil Ref. Co. v. Albritton*, 21 F. 2d 280 (1927).

Thus, in *Steele v. Erie R. R.*, 54 F. 2d 688, affirmed 54 F. 2d 690 (C. C. A. 2, 1931), a Federal Employers' Liability Act case, the *Wilcox* rule was rejected.

The case of *Texas & Pac. Ry. Co. v. Dashiell*, 198 U. S. 521, 25 S. Ct. 521 (1905), is on "all fours" with the instant case.

Even in an ordinary tort suit, *Scheer v. Rockne Motors Corp.*, 68 F. 2d 942, 945 (C. C. A. 2, 1934), Judge L. Hand said:

> "These assurances were much more positive than that before the Court in Chicago & N. W. Ry. Co. v. Wilcox, 116 F. 913 (C. C. A. 8). *The dicta of the majority we have already refused to follow, preferring Judge Thayer's dissent*" (emphasis supplied).

Today, in most enlightened jurisdictions, there need not even be a *mutual* mistake of fact as to the injury. It is sufficient if there is a bona fide unilateral mistake as to the nature and extent of the injury. In the recent case of *Sullivan v. Elgin J. & E. R. Co.*, 73 N. E. 2d 632 (Ill., 1947), it was held that the release to an employer from future liability for past injuries sustained by the employee is void

unless based upon valuable consideration and that the release, in that case, executed by the employee without knowledge as to the seriousness of his injury, would be set aside, whether or not the employer was aware at the time that the employee had suffered serious brain injury, as a mistake of fact need not be mutual.

The exact facts, language of the release and check, indeed the same employer defendant, were involved in *Brown v. P. R. R.*, 2 Cir. 158 F. 2 795. That Court set aside that release and predicated its ruling on the same legal principles now adopted by the 3rd Circuit in this opinion, from which this petition appeals.

CONCLUSION.

We respectfully submit that this petition for certiorari should be denied as this Court already passed on the issue of law in the *Dice* case, supra. The view there expressed by this Court is fair and reasonable and in conformance with enlightened labor relations, and is that view most likely to promote a fair administration of the Federal Employers' Liability Act.

Respectfully submitted,

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